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Supreme Court Of The United States

OCTOBER TERM, 1996

CHARITA D. CHALMERS,

Petitioner,

v.

TULON CO. OF RICHMOND,

Respondent.

Petition For A Writ Of Certiorari to the United States Court Of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether Title VII of the Civil Rights Act, 42 U.S.C. §2000e(j), requires employees to give "advance notice" of any religiously motivated action they might take, and whether this judicially created element should be part of a plaintiff's *prima facie* case.

(2) Whether the status of Title VII of the Civil Rights Act, 42 U.S.C. §2000e(j), as a remedial statute subjects it to a liberal interpretation whose exemptions should be narrowly construed under conventional rules of statutory construction.

(3) Whether the language of Title VII of the Civil Rights Act, 42 U.S.C. §2000e(j), permits a court to shift the statutory burden from the defendant employer to the plaintiff employee instead of requiring the employer to *demonstrate* that it was unable to reasonably accommodate plaintiff's religious practice without incurring an undue hardship.

PARTIES TO THE PROCEEDING BELOW

Petitioner: Charita D. Chalmers (plaintiff-appellant)
Respondent: Tulon Co. of Richmond (defendant-appellee)

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No.

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CHARITA D. CHALMERS,

Petitioner,

V.

TULON CO. OF RICHMOND,

Respondent.

Petition For A Writ Of Certiorari to the United States Court Of Appeals for the Fourth Circuit

Petitioner, Charita D. Chalmers, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit which affirmed the decision of the District Court granting summary judgment to Tulon Company of Richmond on all issues.

OPINIONS BELOW

The decision of the United States District Court for the Eastern District of Virginia, was stated from the bench, A-44 and a final order was entered granting summary judgment "[f]or reasons stated from the bench." A-32. The order of the district court was entered on July 26, 1995. *Id.* The only published opinion in this dispute is found in *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996). A-1. Plaintiff-appellant's petition for rehearing and suggestion for rehearing *en banc* was denied by order filed January 16, 1997. A-45.

All opinions are reprinted in the Appendix which accompanies this petition.

JURISDICTION

Review is sought from the decision of the United States Court of Appeals for the Fourth Circuit entered on December 4, 1996. Petition for rehearing and suggestion for rehearing *en banc* was denied by order filed January 16, 1997.

Jurisdiction is conferred on this Court pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

Set forth in the Appendix, page A-47 and A-46 are relevant portions of Title VII, 42 U.S.C. § 2000e(j) and 42 U.S.C. § 2000e-2(a)(1), respectively.

STATEMENT OF THE CASE

Charita Chalmers ("Chalmers") is an evangelical Christian who was employed by Tulon Company of Richmond ("Tulon"). Acting on her *bona fide* sincerely held religious belief that she should share the gospel with others, Chalmers wrote letters to two co-workers (LeMantia and Combs) with whom she had previously discussed her faith, without their objection. The letters were written and sent from Chalmers' home to the co-workers' homes. The letter which led to her dismissal evidenced on its face that Chalmers sincerely believed that her faith mandated its being written. After the wife of one of the recipients opened and misconstrued the meaning of the letter addressed to her husband, Tulon fired Chalmers.

Chalmers filed suit against Tulon on the grounds that it violated Title VII by failing to accommodate her religious beliefs. The District Court granted Tulon's motion for summary judgment, holding that Chalmers' letters constituted "zealotry" in response to which Tulon would have been derelict if it had not fired Chalmers. Chalmers then appealed to the Fourth Circuit.

The Fourth Circuit held in a 2-1 decision that Chalmers' bona fide religious beliefs caused her to write the letters and that Tulon fired her solely because she did so. 101 F.3d at 1019. Nonetheless, the Fourth Circuit held that Chalmers failed to establish a *prima facie* religious accommodation claim because she did not inform Tulon ***in advance*** of sending the letters that her religious beliefs compelled her to express her beliefs to her co-workers during non-business hours. 101 F.3d at 1019-21. In addition, the Fourth Circuit held that even if Chalmers had established a *prima facie* case, her religious accommodation claim would nonetheless fail because her writing of the two brief letters to co-workers with whom she had previously discussed her faith without objection constituted such egregious conduct that an employer could not possibly accommodate her. 101 F.3d at 1021.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because this Court has not established an analytical framework for evaluating religious accommodation claims under Title VII. It should do so (1) to resolve the conflict between the circuits; and (2) to provide needed guidance for an area of the law in which there is increasing litigation. Because of the absence of this analytical framework, the Fourth Circuit failed to protect Chalmers from Tulon's wrongful discrimination against her based solely on Chalmers' *bona fide* expression of her faith. In so doing, the court of appeals has misapplied the law under Title VII, a misapplication that puts it in conflict with the law of other circuits.

The Fourth Circuit created a different standard from that used by other Circuits in finding that Chalmers failed to make out a *prima facie* case of religious discrimination under Title VII of the Civil Rights Act. In so doing, it created a notice requirement that constitutes an additional religious disclosure burden on Title VII plaintiffs, without foundation in the statute or case law. The Fourth Circuit has "grafted a claim-

defeating notice requirement onto the statutory requirements for establishing a *prima facie* case." *Chalmers,* 101 F.3d at 1025 (Niemeyer, Circuit Judge, dissenting). The ruling that a Baptist woman who communicates her faith outside of the workplace with a co-worker may be fired because she did not "warn" her employer in advance that she was going to express her faith, conflicts with the decisions regarding establishing a *prima facie* case for a religious accommodation claim under Title VII in other courts of appeals, including the Eighth Circuit (*Wilson v. U.S. West Communications*, 58 F.3d 1337 (8th Cir. 1995); *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995) (*en banc*), *cert. denied,* ____ U.S. ____, 116 S.Ct 1042 (1996)) and the Ninth Circuit (*Heller v. EBB Auto Co.*, 8 F.3d 1433 (9th Cir. 1993)).

The decision also conflicts with the decisions of other courts of appeals and Title VII itself by failing to require the defendant to *demonstrate* that it is "unable to reasonably accommodate to the religious practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). The Fourth Circuit wrongly imposed on Chalmers the burden of showing that her conduct was not beyond accommodation, a burden which is grounded in neither the statute nor case law.

The two errors by the Fourth Circuit described above are exacerbated by the fact that Chalmers' claim was dismissed at summary judgment, when the law requires that all factual issues be resolved in Chalmers' favor.

1. The Fourth Circuit decision conflicts with decisions in other circuits and misconstrues the facts in finding that petitioner failed to make out a *prima facie* case of religious discrimination under Title VII.

Title VII of the Civil Rights Act mandates that:

> it shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any in-

> dividual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1). The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is "unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

In 1967, the Equal Employment Opportunity Commission (EEOC) adopted the "reasonable accommodation rule." This rule required employers to "make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1, 32 Fed. Reg. 10298, July 13, 1967. In 1972, Congress codified the rule, making the reasonable accommodation standard statutory. 42 U.S.C. § 2000e(j).

This Court has, so far, declined to establish a proof scheme for religious accommodation claims similar to those it has in other Title VII contexts. See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67-68 (1986). The instant case was the first occasion the Fourth Circuit had to articulate a framework for analyzing religious accommodation claims. *Chalmers,* 101 F.3d at 1019. While neither this Court, nor Title VII itself establishes a proof scheme, most Courts of Appeals apply the following *prima facie* standards to religious accommodation claims:

(1) he or she has a bona fide religious belief that conflicts with an employment requirement;

(2) he or she informed the employer of this belief;

(3) he or she was disciplined for failure to comply with the conflicting employment requirement.

Philbrook v Ansonia Bd. of Educ., 757 F.2d 476, 481 (2d Cir. 1985) (quoting *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984)), *aff'd on other grounds*, 479 U.S. 60, 65 (1986).[1] In the absence of this Court's endorsement of any particular framework to analyze "religious accommodation" claims, the Fourth Circuit has "grafted a claim-defeating notice requirement onto the statutory requirements for establishing a *prima facie* case." *Chalmers*, 101 F.3d at 1025 (Niemeyer, Circuit Judge, dissenting).

This Court has previously held that the elements of proof in employment discrimination cases are not meant to be "rigid, mechanized or ritualistic." *Furnco Constr. Corp. v. Waters*, 428 U.S. 567, 577 (1978). Similarly, this Court previously recognized in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n.13 (1973), that "[t]he facts necessarily will vary in Title VII cases, and the specification [above] of the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations."

While this Court and Title VII itself are silent as to whether there is any kind of a "notice requirement" which a religious employee must provide to his or her employer, the Fourth Circuit went beyond requiring mere notice and created an "advance notice requirement." As Judge Niemeyer noted in his dissent, "It is legal error to construe Title VII to impose a burden on the employee of informing her employer in advance about each practice the employee will follow in further-

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[1] See *Ansonia*, 757 F.2d at 481, *Protos v. Volkwagen*, 797 F.2d 129, 133 (3d Cir. 1986), *cert. denied*, 479 U.S. 972 (1986); *Chalmers*, 101 F.3d at 1019; *Turpen*, 736 F.2d at 1026; *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987), *cert. denied*, 485 U.S. 989 (1988); *Beaseley v. Health Care Serv. Corp.*, 940 F.2d 1085, 1088 (7th Cir. 1991); *Brown v. General Motors corp.*, 601 F.2d 956 (8th Cir. 1979); *Proctor v. Consolidated Freightways Corp.*, 795 F.2d 1472, 1475 (9th Cir. 1986); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481 (10th Cir. 1989), *cert. denied*, 495 U.S. 948 (1990).

ance of religious beliefs." *Chalmers,* 101 F.3d at 1025 (Niemeyer, Circuit Judge, dissenting).

This new "advance notice requirement" is, in essence, a new exemption for employers from Title VII's provisions. "To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." *Phillips Co. v. Walling*, 324 U.S. 490, 493 (1945). See, e. g., *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979); *Abbott Laboratories v. Portland Retail Druggists Assn.*, 425 U.S. 1, 12 (1976); *Peyton v. Rowe*, 391 U.S. 54, 65 (1968).

The majority's fundamental error is that it turns the purpose of the notice requirement on its head. Rightfully understood, as it is in other circuits, the purpose of the notice requirement is to help ascertain whether an employer's negative employment action, (*e.g.*, discharging Chalmers) was taken with an understanding that the employee's conduct was motivated by a *bona fide* religious belief. As Judge Niemeyer wrote in dissent, Title VII:

> does not impose an additional religious disclosure burden on Title VII plaintiffs. Instead, it is merely a recognition that Title VII's "because of" requirement cannot be satisfied where the employer has no knowledge that the conduct warranting discharge was religious in nature.

Chalmers, 101 F.3d at 1025 (Niemeyer, Circuit Judge, dissenting). See *Cary v. Carmichael*, 908 F.Supp. 1334, 1343-44 (E.D.Va. 1995) and *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993). Tulon obviously understood the religious nature of the conflict, as the majority readily concedes. *Chalmers,* 101 F.3d at 1019. Similarly, it is undisputed that Tulon fired Chalmers because of the conflict between her religious practice and Tulon's retroactively created and applied employment requirement that she not ever express her faith in writing. The majority ignores the legitimate purpose of the

notice requirement and turns it into an arbitrary "trap for the unwary" requirement. This construction of the notice requirement is inconsistent with decisions of other circuits and must be reversed.

One case illustrating in high relief how far "out of synch" the Fourth Circuit is with the holdings of other Circuits is *Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986). In *Baz*, the Court discussed the notice requirement of *Redmond* in a footnote:

> We have also required a religious-discrimination plaintiff to show that he called his religious practices to his employer's attention[]. It is not clear that [plaintiff] made this showing *but we have waived that showing where the record shows that the employer did have notice of the conflict.*

Baz, 782 F.2d at 706 (emphasis added).

In *Brown v. Polk County, supra,* the employer was found liable for firing its director for praying with and witnessing to co-workers on the job. The Eighth Circuit held that the fact that the employee never explicitly asked for accommodation for his religious activities does not mean he is not protected by Title VII; the employer need only have enough information about employee's religious needs to permit the employer to understand the existence of a conflict. The court found that the employer violated Title VII when it fired Brown, without first exploring accommodation, based on the religious activities giving rise to the first reprimand.

Similarly, in *Heller v. EBB Auto Co., supra,* the Ninth Circuit addressed the notice issue in a case involving an individual who disregarded his employer's directive that he work rather than attend a ceremony in which his wife and children were converted to Judaism.

> A sensible approach would require only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict

> between the employee's religious practices and the employer's job requirements.

8 F.3d at 1439; *Brown v. Polk County*, 61 F.3d at 654.

It is not by happenstance that the notice requirement imposed on plaintiffs in religious accommodation cases is not more onerous. Other circuits have recognized that any greater requirement would wrongly permit employers to examine the religious practices of their employees. *See, e.g., Heller,* 8 F.3d at 1438-40; *Redmond v. GAF Corp.*, 574 F.2d 897, 900 (7th Cir. 1978). "If courts may not make such an inquiry, then neither should employers." *Heller,* 8 F.3d at 1439.

This "claim-defeating notice requirement"

> would mean that *as a matter of law* a Jew could not make out a *prima facie* case under Title VII if, on the first day of work, he was fired for wearing a yarmulke that, unknown to him, violated his company's dress code. Similarly, a Muslim would have no case for being fired the first time mandatory company meetings conflicted with his prayer schedule; a Jehovah's Witness would have none upon being fired for her disrespect in refusing to attend a company-wide celebration of the CEO's birthday; a Mormon would have none for being fired the first time he refused to work late on church-wide family nights. And, of course, as the majority concludes, an evangelical Baptist's case would fail as a matter of law if she is fired the first time she puts in writing the religious ideas that she has been permitted and encouraged to speak. This is not the law of Title VII.

Chalmers, 101 F.3d at 1026 (Niemeyer, Circuit Judge, dissenting). As Judge Niemeyer noted "[u]nder that rule an employer would automatically be exonerated from liability when, *e.g.*, it fired an employee who arrived at work on Ash Wednesday with a cross of ashes marked on her forehead, be-

cause the employee violated a work rule against face paint. The irrationality of such a rule is readily apparent." *Id.* at 1025.

Even if the majority correctly articulated the notice requirement, it erred in holding that the requirement was not satisfied in this case. The record is replete with evidence that Tulon knew that Chalmers had ongoing conversations about religion with her co-workers and supervisor, her supervisor was aware that she believed she should urge co-workers to "accept God," she had repeatedly discussed religion with her supervisor, without consequence. He never objected or took exception to any religious discussion with her, and in fact treated her with the utmost respect as a result of her religious convictions. Even if the undisputed facts concerning Chalmers' actions in oral conversation with her co-workers were somehow not sufficient to satisfy the notice requirement, the letter to Chalmers' boss independently gave Tulon express notice by stating at the outset that "[t]he reason I'm writing you is because the Lord wanted me to share something with you." *Chalmers,* 101 F.3d at 1015.

The error of the majority's ruling regarding the notice requirement is underscored by the fact that Chalmers herself could not possibly have known that sending the letters conflicted with an employment requirement of Tulon. Chalmers could not possibly have understood that changing her mode of communication from oral speech during work hours, to which Tulon had not objected, to written speech outside of normal business hours, necessitated giving special notice to Tulon. See *Wilson v. U.S. West Communications, supra* (*prima facie* case of religious discrimination established where plaintiff was fired for wearing an abortion pin, even though the employer had no dress code or other related employment requirements). Most Title VII accommodation cases have dealt with an employee's need to give notice of religious practices which would interfere with an employer's hours or ability to function; communications between employees after working

hours when a personal relationship has been established would not generally be considered a matter affecting an employer's business, and therefore, not something about which an employee would imagine she needed to notify her employer.

Chalmers' religious conduct unquestionably put Tulon on notice that her beliefs were in conflict with Tulon's employment requirements, thereby triggering Tulon's obligation to accommodate her religious practice.

2. The Fourth Circuit decision ignores the fact that Title VII is a remedial statute subject to liberal interpretation and whose exemptions should be narrowly construed under conventional rules of statutory construction.

Title VII, a remedial statute,[2] should be construed in favor of those whom the legislation was designed to protect. See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397-398 (1982); *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972). Accordingly, under longstanding principles of statutory construction, a remedial statute should "be given a liberal interpretation . . . (and) exemptions from its sweep should be narrowed and limited to effect the remedy intended." *Piedmont & Northern R. Co. v. ICC*, 286 U.S. 299, 311-312 (1932); see also *Spokane & Inland R. Co. v. United States*,

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[2] Cases noting that Title VII is a remedial statute include *Kachmar v. Sungard Data Systems*, 1997 U.S. App. Lexis 5564 (3d Cir. 1997); *Henderson v. Eastern Freight Ways, Inc.*, 460 F.2d 258, 260 (4th Cir. 1972), *cert. denied*, 410 U.S. 912 (1973); *Hernandez v. Aldridge*, 866 F.2d 800, 803 (5th Cir. 1989), *cert. granted and judgment vacated*, 494 U.S. 1013 (1990); *Ang v. Proctor & Gamble Co.*, 932 F.2d 540, 546 (6th Cir. 1991); *Ruedlinger v. Jarrett*, 106 F.3d 212, 214 (7th Cir. 1997); *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 732 (1995); *Nichols v. Hurley*, 921 F.2d 1101, 1104 (10th Cir. 1991); *Turner v. Orr*, 804 F.2d 1223, 1227 (11th Cir. 1986), *cert. denied*, 478 U.S. 1020 (1986); *Hopkins v. Price Waterhouse*, 920 F.2d 967, 975 (D.C.Cir. 1990).

241 U.S. 344, 350 (1916); *United States v. Dickson*, 15 Pet. 141, 165, 10 L.Ed. 689 (1841)(Story, J.).

Despite these rules of statutory construction, the Fourth Circuit has imposed a "crabbed" reading of Title VII's protections by imposing the above-described *prima facie* standards in a formalistic and inflexible manner. The majority in this case held that Chalmers failed to satisfy the second element of her *prima facie* case because she did not give prior notice to Tulon of her intention to write two evangelistic letters. At best, this holding is precisely the sort of ritualistic approach the Court cautioned against in *McDonnell;* at worst, it erroneously changes the legal standard for proving a *prima facie* case under Title VII.

In the instant case, two rules of statutory construction were violated. First, by narrowly interpreting the protections of Title VII, a clearly remedial statute, the majority ignored the rule of statutory construction that remedial legislation should be construed in favor of those whom the legislation was designed to protect. Second, by "graft[ing] a claim-defeating notice requirement onto the statutory requirements for establishing a *prima facie* case," the majority failed to obey the canon of statutory interpretation that exemptions from the sweep of remedial legislation should be narrowed and limited to effect the remedy intended.

As this Court noted in refusing to require a "second filing requirement" in Title VII cases, such procedural hurdles, would "serve no purpose other than the creation of an additional procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process." *Love,* 404 U.S. at 526-527. The Fourth Circuit thus departed not only from the standards of statutory interpretation recognized by this Court, but also the rationale employed by this Court in *Zipes* and *Love.*

3. The Fourth Circuit decision conflicts with other courts of appeals and Title VII itself by shifting the burden regarding undue hardship from the defendant employer to the plaintiff employee.

Once a plaintiff establishes a *prima facie* case, the employer has the burden of demonstrating that it is "unable to reasonably accommodate to the religious practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

The difficulty here is that "[b]y ruling that as a matter of law Chalmers' conduct was not susceptible to accommodation, the majority in effect shifts to Title VII plaintiffs the burden of refuting a defense that the defendant neither asserted nor demonstrated." *Chalmers*, 101 F.3d at 1027 (Niemeyer, Circuit Judge, dissenting).

The Fourth Circuit erred in "absolutizing" Chalmers' religiously motivated conduct. As Judge Niemeyer noted in dissent:

> The majority assumes that Chalmers' "need" to write evangelical letters is absolute and that she would not stop writing them if asked to do so. This conclusion is drawn from the unsupported belief that Chalmers' "religious beliefs *required* her to send personal, disturbing letters to her co-workers," op. at 1019 (emphasis added) and also at 1020, or that they "compelled her to write them," op. at 1020, and that "she has a religious *need* to impose personally and directly on fellow employees." Op. at 1021 (emphasis added). These conclusions, however, are not supported by the record. Chalmers stated that she was "*led* by the Lord" and "*inspired*" to write LaMantia. To conclude that these statements mean that she could not, consistent with her religious beliefs, accept requests to stop writing may not even be a legitimate inference,

> much less the only legitimate inference. Certainly, it requires factfinding, which we are not free to do.

Id. at 1027.

Certainly, "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. at 69. Yet, as other circuits recognize, it is the *employer* which must take "some initial step to reasonably accommodate the religious belief" of its employee. *Heller*, 8 F.3d at 1440, quoting (citations omitted). It is the employer that must "at a minimum, negotiate with the employee in an effort reasonably to accommodate the employee's religious beliefs." *Id.* (citations omitted); *see also*, *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1512 (9th Cir. 1989); *Transworld Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977); *EEOC v. Ithaca Industries, Inc., supra.*

Nothing in the record suggests that Tulon even considered, much less attempted, the required accommodation. Had it made even the most minimal and preliminary effort to "explore accommodation," such as by discussing the situation with Chalmers, this entire dispute could have been avoided. Since Tulon failed to make any effort to accommodate Chalmers, it may prevail only if it can show as a matter of law that Chalmers' continued employment could not be permitted "without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). An employer's refusal to accommodate is justified "only when an employer . . . can *demonstrate* that an undue hardship would in fact result from each available alternative method of accommodation." 29 C.F.R. § 1605.2(c)(1) (emphasis added). *See Heller,* 8 F.3d at 1440. On motion for summary judgment, the defendant must show that each available alternative method of accommodation would, as a matter of law, result in undue hardship. This Court should closely scrutinize the assertion that no accom-

modation was possible in light of the procedural posture of this case, the purpose of requiring an accommodation of an employee's religious practices, and the constitutional constraints cautioning against individual judicial determinations that a religious practice represents "poor judgment."

No doubt recognizing that Tulon made no effort whatsoever to accommodate Chalmers, the majority concludes that "Chalmers' conduct is not the type that an employer can *possibly* accommodate, even with notice." (Emphasis added.) *Chalmers,* 101 F.3d at 1021. Given its obligation to resolve factual differences in favor of the plaintiff, this conclusion essentially means that the Fourth Circuit holds as a matter of law that the single act of sending a short proselytizing letter to two fellow employees creates an undue hardship for an employer that cannot possibly be resolved without firing the letter writer. This is not the law in any other circuit; the Court should not allow it to stand as the law of the Fourth Circuit.

The Fourth Circuit's finding that it would be "too difficult" to allow Chalmers' continued employment is not based on any hardship sustained as a result of any attempted accommodation of her religious expression. *Cf. Ithaca Indus.*, 849 F.2d at 119 (discussing TWA's efforts to accommodate in *TWA v. Hardison, supra*). The other circuits that have addressed the issue are unanimous in holding that an employer cannot carry its burden of proving an undue hardship by baseless speculation that unattempted accommodation would cause undue hardship.

> Any hardship asserted, furthermore, must be real rather than speculative, merely conceivable, or hypothetical. An employer stands on weak ground when advancing hypothetical hardships in a factual vacuum. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts. Undue hardship requires more than proof of some fellow-worker's grumbling. . . . An employer . . . would have to show . . . actual imposition on co-workers or disruption of the work routine.

Brown v. Polk County, 61 F.3d at 655; *See also, e.g., Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481 (10th Cir. 1989) (proffered hardship must be "actual"; employer cannot rely merely on speculation), *cert. denied*, 495 U.S. 948 (1990); *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397, 402 (9th Cir. 1978)(undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts), *cert. denied*, 442 U.S. 921 (1979); *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520-21 (6th Cir. 1975) (court rejected "hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice"). Tulon cannot show undue hardship and is not entitled as a matter of law to summary judgment in this case.

The record is devoid of any evidence that Tulon carried its burden of proving that Chalmers' continued employment would have constituted an undue hardship on the conduct of its business. Defendant asserts that Chalmers' letters damaged her work relationships to such an extent that it would be "too difficult" to allow her to continue to work. The majority bases this finding of fact on Mr. LaMantia's statement that he felt a viable working relationship could not be maintained between him and Chalmers. Whatever "feelings" Mr. LaMantia had about the working relationship on the day he received the letter, there is no evidence that Chalmers' continued employment during the two weeks following the incident was an actual imposition on him or Tulon. There was no apparent disruption of the work routine other than the events of the day Mr. LaMantia received the letter. This is not surprising, since the disruption was not so due to Chalmers' religious letters *per se*, but rather the result of Mrs. LaMantia's unforeseeable interception of her husband's mail and the even more unforeseeable circumstances leading to her interpretation of the letter as implying Mr. LaMantia's infidelity. Regardless, Mr. LaMantia continued to work with Chalmers with no apparent difficulty or discomfort for approximately two weeks. Given the context of Chalmers' exemplary employment over

the course of the preceding five years, the letters were inconsequential as a legal matter because they were spontaneous, isolated, and unlikely to be repeated.[3]

The majority also bases its finding on Brenda Combs' statements obtained by Tulon after the letter to her came to its attention. The letter itself caused no disruption of the work routine. Combs disclaimed any offense or damage to her working relationship with Chalmers as a result of the letter. Combs felt that Tulon harassed her about the matter, and she was deeply upset that Tulon fired Chalmers for writing the letters. In fact, it was Tulon's reliance on the letter to Combs as its basis for firing Chalmers that actually disrupted the work routine. As a result, other employees blamed Combs for Chalmers' dismissal. Combs' continued relationship with Chalmers, however, enabled her to contact Chalmers, who then explained to the other employees that Combs was not at fault.

The only other possible basis for the finding of undue hardship is that Chalmers' continued employment might lead to allegations of a hostile work environment. There is, however, no factual or legal support for this assertion. While it is possible for "religious harassment" to exist in the workplace, the harassment must be sufficiently severe or pervasive to affect "a term, condition or privilege of employment." *Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627, 632 (Iowa 1990).

In light of the pluralistic nature of today's workplace, the prospect of Title VII being used by employees as a vehicle to muzzle the majority -- or minority -- views of their co-workers is certainly an issue of great concern. To imply that employers, acting under the color of Title VII or state anti-discrimination laws are affirmatively obligated to silence the religious views of their employees even during non-business hours, clearly implicates the rights of conscience and religious

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[3] Mr. LaMantia, for instance, is no longer employed by defendant. App. p. 116.

practices guaranteed by the Constitution. See *Meltebeke v. Bureau of Labor and Industries*, 322 Or. 132, 903 P.2d 351 (Oregon 1995)(*en banc*)(employer has an affirmative defense against religious harassment charges based on rights of conscience and religious practices guaranteed by Constitution). Similarly, in the First Amendment context, where government officials attempt to justify the suppression of private religious speech on the basis of Establishment Clause concerns and mistaken attribution, the courts should closely scrutinize employers' suppression of employees' religious speech or refusals to accommodate employee religious practices on the basis of concerns that other employees may allege religious harassment. *Cf. Brown v. Polk County*, 61 F.3d at 659 (Establishment Clause concerns do not justify governmental employer's prohibition of religious expression in the workplace).

In any event, the factual scenario of a religiously hostile work environment is not presented in this case. Neither Combs nor LaMantia were harassed in any manner, let alone to the degree, nor with the frequency which would justify such a claim. Therefore, not only would Tulon's fear of liability for allowing a hostile work environment be speculative as an undue burden, but it also would allow the company to act as Orwellian thought police undercutting religious as well as other expression.

CONCLUSION

As Judge Niemeyer observed in his dissent below,

> Whatever we or the district court think about Chalmers' religious practices, it is not our place to preempt a trial of her claim by assuming that all factual disputes will be resolved against her. And we err legally by imposing a statutorily ungrounded prior notice requirement in circumstances where the employer fully appreciates the religious nature of a

> practice. Finally, we compound that error by shifting to the plaintiff a burden that the statute places on the defendant.

Chalmers, 101 F.3d at 1027 (Niemeyer, Circuit Judge, dissenting).

For the reasons set forth above, Petitioner prays that her Petition For a Writ of Certiorari be granted and that this Court decide the issues raised in the Petition.

Respectfully submitted,

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DATED: April 16, 1997.

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2594

CHARITA D. CHALMERS,
Plaintiff-Appellant,

v.

TULON COMPANY OF RICHMOND,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge.
(CA-94-868 R)

Argued: July 10, 1996
Decided: December 4, 1996

Before NIEMEYER, MICHAEL, and MOTZ, Circuit Judges.

Affirmed by published opinion. Judge Motz wrote the majority opinion, in which Judge Michael joined. Judge Niemeyer wrote a dissenting opinion.

COUNSEL

ARGUED: Richard J. Keshian, William E. Wright, PETREE STOCKTON, Winston-Salem, North Carolina, for Appellant. David E. Nagle, LECLAIR RYAN, Richmond, Virginia, for Appellee. **ON BRIEF:** Dean L. Whitford, THE RUTHERFORD INSTITUTE, Charlottesville, Virginia; John Fairfax Pyle, Amherst, Virginia, for Appellant. Kevin D. Holden, LECLAIR RYAN, Richmond. Virginia, for Appellee.

OPINION

DIANA GRIBBON MOTZ. Circuit Judge:

Charita Chalmers contends that the district court erred in granting summary judgment to her employer, Tulon Co. ("Tulon"), on her claim that Tulon failed to accommodate her religious conduct. Because Chalmers provided Tulon with no notice of her need to engage in this conduct and because, in any event, this conduct was not susceptible to accommodation, we affirm.

I.

The parties do not dispute the material facts. In stating the facts here, we draw most of them from Chalmers' complaint, J.A. 4-9, and deposition testimony, J.A. 50-90 and 98-107. Only when Chalmers did not testify to a fact do we rely on other sworn testimony.[1]

Chalmers worked for Tulon from October 1988 until September 21, 1993. J.A. 5. Tulon's business involves the manufacturing of drill bits and routers used in the printed circuit board industry. J.A. 42. Tulon maintains a number of service centers throughout the United States, including a center in Richmond, Virginia where Chalmers worked. *Id.* During Chalmers' years at Tulon, the Richmond center employed from six to fifteen employees. J.A. 52-53, 56&57.

Chalmers began her employment as a repoint operator, J.A. 5, 53, and, after three years, was promoted to supervisor.

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[1] In view of the lack of any dispute as to the material facts, and our careful reliance on the record and particularly on Chalmers' own testimony, we are puzzled by our dissenting colleague's assertion that we "repeatedly and unfairly cast Chalmers' religious activity in the worst possible light, failing to take the facts in the light most favorable to her." Dissent at 17. We have accurately set forth the facts in the record, including joint appendix references for each fact; we note the dissent does not cite any joint appendix references for the facts we "unfairly" fail to take into account.

J.A. 5, 55, 62. During her employment with Tulon, although Chalmers had some issues with her job training, she believed Tulon treated her fairly with respect to compensation, benefits, and job assignments. J.A. 54-55, 57-59. Prior to her discharge, Chalmers never felt anyone at the company discriminated against her, J.A. 55, 58, or harassed her because of her religious beliefs or practices. J.A. 65.

As repoint supervisor, Chalmers was the only management-level employee working regularly at the Richmond center. J.A. 43. Chalmers' immediate supervisor, Richard C. LaMantia, was in charge of sales throughout the eastern part of the United States but, according to Chalmers, visited Richmond only a few days every few months. J.A. 51-52. At all other times, Chalmers was responsible for the operation of the Richmond center. J.A. 43. Chalmers recognized that it was part of her supervisory responsibility to promote harmony in the workplace and set an example for her subordinates. J.A. 64.

Chalmers has been a Baptist all of her life, and in June 1984 became an evangelical Christian. J.A. 50. At that time, she accepted Christ as her personal savior and determined to go forth and do work for him. *Id.* As an evangelical Christian, Chalmers believes she should share the gospel and looks for opportunities to do so. J.A. 105.

Chalmers felt that LaMantia respected her, generally refraining from using profanity around her, while around other employees who did not care, "he would say whatever he wanted to say." J A. 65. LaMantia had taken Chalmers and her husband to dinner once and she felt that she and LaMantia had a "personal relationship" and that she could talk to him. J.A. 71. Chalmers stated that "in the past we have talked about God." *Id.* Chalmers further testified that "starting off" she and LaMantia had discussed religion about "everytime he came to the service center . . . . maybe every three months" but "then, towards the end maybe not as frequently." J.A. 107. LaMantia never discouraged these conversations, ex-

pressed discomfort with them, or indicated that they were improper. J.A. 107. In one of these conversations, LaMantia told Chalmers that three people had approached him about accepting Christ. J.A. 72.

Two or three years after this conversation, *id.* Chalmers 'knew it was time for [LaMantia] to accept God." J.A. 66. She believed LaMantia had told customers information about the turnaround time for a job when he knew that information was not true. J.A. 66; J.A. 70. Chalmers testified that she was "led by the Lord" to write LaMantia and tell him "there were things he needed to get right with God, and that was one thing that . . . he needed to get right with him." J.A. 66-67.

Accordingly, on Labor Day, September 6, 1993, J.A. 84, Chalmers mailed the following letter to LaMantia at his home:

> Dear Rich,
>
> The reason I'm writing you is because the Lord wanted me to share somethings [sic] with you. After reading this letter you do not have to give me a call, but talk to God about everything.
>
> One thing the Lord wants you to do is get your life right with him. The bible says in Roman 10:9vs that if you confess with your mouth the Lord *Jesus* and believe in your heart that God hath raised him from the dead, thou shalt be saved. vs 10 - For with the heart man believeth unto righteousness, and with the mouth confession is made unto salvation. The two verse are [sic] saying for you to get right with God now.
>
> The last thing is, you are doing somethings [sic] in your life that God is not please [sic] with and He wants you to stop. All you have to do is go to God and ask for forgiveness before it's too late.
>
> I wrote this letter at home so if you have a problem with it you can't relate it to work.

I have to answer to God just like you do, so that's why I wrote you this letter. Please take heed before it's too late.

In his name,

Charita Chalmers

J.A. 67-68; 91-92.

Chalmers was unaware of any other Tulon employees who sent to co-workers at their homes letters regarding religious beliefs, or, indeed, any mail, other than Christmas, birthday, or congratulatory cards. J.A. 80. Chalmers acknowledged that LaMantia had never said or done anything that signaled to her that he consented to a letter like this. J.A. 71. When asked whether she knew "what Rich LaMantia's religious beliefs are," Chalmers responded that she knew "he believe[d] in God, that's about it." J.A. 74. She did not know his religious affiliation or whether he attended church regularly. J.A. 73-74. Nevertheless, Chalmers felt that she could write the above letter to LaMantia at his home because of their "personal relationship" and their conversation two or three years earlier concerning people approaching LaMantia about accepting Christ. J.A. 66, 71, 72.

On September 10, 1993 when Chalmers' letter arrived at LaMantia's home, he was out of town on Tulon business and his wife opened and read the letter in his absence. J.A. 43, 69. Mrs. LaMantia became distraught, interpreting the references to her husband's improper conduct as indicating that he was committing adultery. J.A. 69-70. In tears, she called Chalmers and asked her if LaMantia was having an affair with someone in the New Hampshire area where LaMantia supervised another Tulon facility. *Id.* Mrs. LaMantia explained that three years before she and LaMantia had separated because of his infidelity. *Id.* Chalmers told Mrs. LaMantia that she did not know about any affair because she was in the Richmond area. *Id.* When Mrs. LaMantia asked her what she

had meant by writing that there was something in LaMantia's life that "the needed to get right with God," Chalmers explained about the turnaround time problem. J.A. 70. Mrs. LaMantia responded that she would take the letter and rip it up so LaMantia could not read it. *Id.* Chalmers answered, "Please don't do that, the Lord led me to send this to Rich, so let him read it." J.A. 70-71. The telephone conversation then ended. *Id.*

Mrs. LaMantia promptly telephoned her husband, interrupting a Tulon business presentation, to accuse him of infidelity. J.A. 43. LaMantia, in turn, called the Richmond office and asked to speak with Chalmers; she was in back and by the time she reached the telephone, LaMantia had hung up. J.A. 99. Chalmers then telephoned the LaMantias' home and, when she failed to reach anyone, left a message on the answering machine that she was sorry "if the letter offended" LaMantia or his wife and that she "did not mean to offend him or make him upset about the letter." J.A. 100.

LaMantia also telephoned Craig A. Faber, Vice President of Administration at Tulon. J.A. 43. LaMantia told Faber that the letter had caused him personal anguish and placed a serious strain on his marriage. *Id.* LaMantia informed Faber that he felt he could no longer work with Chalmers. *Id.* LaMantia recommended that Tulon management terminate Chalmers' employment. *Id.* At her deposition, Chalmers was asked what reaction she would have if one of the employees who worked for her telephoned her husband and told him she was committing adultery. J.A. 83. Chalmers pointed out that she had not telephoned anyone and had not written a letter stating that LaMantia was committing adultery, but she acknowledged that if another employee did telephone her husband with this information, it probably would affect her relationship with that co-worker. *Id.*

While investigating LaMantia's complaint, Faber discovered that Chalmers had sent a second letter, on the same day as she had sent the letter to LaMantia, to another Tulon

employee. J.A. 43 and 49. That employee, Brenda Combs, worked as a repoint operator in the Richmond office and Chalmers was her direct supervisor. J.A. 53, 56-57. Chalmers knew that Combs was convalescing at her home, suffering from an undiagnosed illness after giving birth out of wedlock. J.A. 78. Chalmers sent Combs the following letter:

> Brenda,
>
> You probably do not want to hear this at this time, but you need the Lord Jesus in your life right now.
>
> One thing about God, He doesn't like when people commit adultery. You know what you did is wrong, so now you need to go to God and ask for forgiveness.
>
> Let me explain something about *God*. He's a God of Love and a God Of Wrath. When people sin against Him, He will allow things to happen to them or their family until they open their eyes and except [sic] Him. God can put a sickness on you that no doctor could ever find out what it is. I'm not saying this is what happened to you, all I'm saying is get right with God right now. Romans 10:9;10vs says that is [sic] you confess with your mouth the Lord Jesus and believe in your heart that God has raised him from the dead thou shalt be saved. For with the heart man believeth unto righteousness; and with the mouth confession is made unto salvation. All I'm saying you need to invite God into your heart and live a life for him and things in your life will get better.
>
> That's not saying you are not going to have problems but it's saying you have someone to go to.
>
> Please take this letter in love and be obedient to God.
>
> In his name,
>
> Charita Chalmers

J.A. 78-79: 93-94.

Upon receiving the letter Combs wept. J.A. 44. Faber discussed the letter with Combs who told him that she had been "crushed by the tone of the letter." *Id.* Combs believed that Chalmers implied that "an immoral lifestyle" had caused her illness and found Chalmers' letter "cruel." *Id.* Combs, in a later, unsworn statement, asserted that although the letter "upset her" it did not "offend" her or "damage her working relationship" with Chalmers. J.A. 96.[2]

Faber consulted with other members of upper management and concluded that the letters caused a negative impact on working relationships, disrupted the workplace, and inappropriately invaded employee privacy. J.A. 44. On behalf of Tulon, Faber then sent Chalmers a memorandum, informing her that she was terminated from her position. *Id.* The memorandum stated in relevant part:

> We have decided to terminate your employment with Tulon Co. effective today, September 21, 1993. Our decision is based on a serious error in judgment you made in sending letters to Rich LaMantia and Brenda Combs, which criticized their personal lives and beliefs. The letters offended them, invaded their privacy, and damaged your work relationships, making it too difficult for you to continue to work here.

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[2] Faber, in another unsworn statement, which he submitted to the EEOC, and made an exhibit to his affidavit in this case, asserted that when he asked Combs "how her working relationship with Chalmers was after having received the letter and having returned to work." Combs "said that it was awkward but felt that she had no other choice but to 'work through' the situation as Charita was her boss." J.A. 49. We include this for informational purposes only. It does not appear to have figured in the district court's grant of summary judgment and does not figure in our affirmance.

> We expect all of our employees to show good judgment, especially those in supervisory positions, such as yours. We would hope you can learn from this experience and avoid similar mistakes in the future.

J.A. 46.

Chalmers had apologized to LaMantia for any distress the letter caused. J.A. 100. Chalmers believed that except for the fact that LaMantia did not want to discuss the letter with her, neither he nor Combs changed their conduct toward her after receipt of the letters. J.A. 104. Richmond center employees blamed Combs for Chalmers' termination. J.A. 102-103. Although Combs disclaimed any damage to her working relationship with Chalmers as a result of the letter, Tulon's termination decision remained firm. J.A. 96.

As a result of the preceding events, Chalmers filed suit, alleging that Tulon discriminated against her based on her religion, in violation of Title VII. J.A. 4-14. She contended that her letter writing constituted protected religious activity that Tulon, by law, should have accommodated with a lesser punishment than discharge. J.A. 7.

II.

Title VII makes it "an unlawful practice for an employer . . . to discharge any individual. . . because of such individual's religion." 42 U.S.C. § 2000e-2. Courts have recognized that employees may utilize two theories in asserting religious discrimination claims. *See, e.g., Mann v. Frank*, 7 F.3d 1365, 1368-70 (8th Cir. 1993) (analyzing discrimination suit as involving two separate theories). These theories are denominated as the "disparate treatment" and "failure to accommodate" theories. *Id.*

To prove a claim under the disparate treatment theory, an employee must demonstrate that the employer treated her dif-

ferently than other employees because of her religious *beliefs*. The evidentiary burdens placed on the employee under this theory mirror those placed on employees alleging employment discrimination based on race or sex. Accordingly, a plaintiff-employee, alleging disparate treatment with respect to her discharge, satisfies her burden at the summary judgment stage if she establishes that her job performance was satisfactory and provides "direct or indirect evidence whose cumulative probative force supports a reasonable inference that [the] discharge was discriminatory." *See Lawrence v. Mars, Inc.*, 955 F.2d 902, 905-06 (4th Cir.), *cert. denied*, 506 U.S. 823 (1992).

If the employee cannot provide direct evidence, she can utilize a burden-shifting scheme similar to the one the Supreme Court articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to develop an inferential case. *Lawrence*, 955 F.2d at 905-06. This might consist of evidence that the employer treated the employee more harshly than other employees of a different religion, or no religion, who had engaged in similar conduct. *See Moore v. City of Charlotte*, 754 F.2d 1100, 1105-06 (4th Cir.), *cert. denied*, 472 U.S. 1021 (1985). If the employee presents such evidence, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions towards the employee. *Id.* at 1105. The employee is then required to show that the employer's proffered reason is pretextual, and that the employer's conduct towards her was actually motivated by illegal considerations. At all times, the ultimate burden of persuasion lies with the employee. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

Although Title VII similarly classifies religion, sex, and race as illegal considerations, the definition of "religion" in the statute places it in a special category. "Religion" is defined to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious

observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Because this definition includes a requirement that an employer "accommodate" an employee's religious expression, an employee is not limited to the disparate treatment theory to establish a discrimination claim. An employee can also bring suit based on the theory that the employer discriminated against her by failing to accommodate her religious conduct. *See Trans World Airlines, Inc. v Hardison*, 432 U.S. 63 (1977).

In a religious accommodation case, an employee can establish a claim even though she cannot show that other (unprotected) employees were treated more favorably or cannot rebut an employer's legitimate, non-discriminatory reason for her discharge. This is because an employer must to an extent, actively attempt to accommodate an employee's religious expression or conduct even if, absent the religious motivation, the employee's conduct would supply a legitimate ground for discharge.

For example, an employee who is terminated for refusing to work on Sundays can maintain an accommodation claim even if other non-religious employees were also fired for refusing Sunday work, and even though the employer's proffered reason for the discharge - the refusal to perform required Sunday work - is legitimate and nondiscriminatory (because the Sunday work rule applies to all employees, regardless of religion). If the employee has notified the employer of his religious need to take Sundays off, the burden rests on the employer to show that it could not accommodate the employee's religious practice without undue hardship. *See EEOC v. Ithaca Indus., Inc.*, 849 F.2d 116, 118 (4th Cir.) (en banc) (definition of religion under Title VII requires employers to make reasonable accommodations, short of undue hardship), *cert. denied* 488 U.S. 924 (1988).

The district court did not fully elaborate on the basis for its dismissal of Chalmers' claim. The court did state that

Chalmers had failed to establish a prima facie case, and that, even if she had, Tulon had offered a legitimate non-discriminatory reason for her discharge.

In this appeal, Chalmers does not appear to challenge the district court's rationale for dismissing her claim under the disparate treatment theory, nor could she. Tulon's proffered reasons for discharging Chalmers - because her letters, which criticized her fellow employees' personal lives and beliefs, invaded the employees' privacy, offended them and damaged her working relationships - are legitimate and non-discriminatory. Examination of the letters indicates that Chalmers knew that her conduct might distress her co-workers (*e.g.*, her statement in the letter to Combs - "You probably do not want to hear this"). Additionally, the damage to her working relationship with LaMantia, arising from the marital discord her letter caused, is attributable to Chalmers whether or not it was intended or foreseeable (had she not invaded LaMantia's privacy by sending the letter to his home and included vague references to immoral conduct, Mrs. LaMantia would not have been upset).

Chalmers' primary argument is not that the district court erred in its analysis of her claim under the disparate treatment theory, but that the court erred in failing to analyze her suit under the accommodation theory. In other words, she apparently maintains that even if her letters provided Tulon with a legitimate reason for her discharge, her religious motive for writing the letters required Tulon to accommodate her conduct. Accordingly, we turn to the question of whether Chalmers' complaint survives summary judgment under the accommodation theory.

III.

We have never articulated a framework for analyzing religious accommodation claims. Several of our sister circuits, however, have developed such a framework, which we now adopt.

To establish a prima facie religious accommodation claim, a plaintiff must establish that: "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement." *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985) (quoting *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984)), *aff'd on other grounds*, 479 U.S. 60, 65 (1986). If the employee establishes a prima facie case, the burden then shifts to the employer to show that it could not accommodate the plaintiff's religious needs without undue hardship. *Id*; *see also EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d 219, 221-22 (6th Cir. 1991); *Beasley v. Health Care Serv. Corp.*, 940 F.2d 1085, 1088 (7th Cir. 1991); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1512 (9th Cir. 1989); *Jenkins v. Louisiana*, 874 F.2d 992, 995 (5th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 133 (3d Cir.), *cert. denied*, 479 U.S. 972 (1986).

Chalmers has alleged that she holds bona fide religious beliefs that caused her to write the letters. Tulon offers no evidence to the contrary. The parties agree that Tulon fired Chalmers because she wrote the letters. Accordingly, Chalmers has satisfied the first and third elements of the prima facie test. However, in other equally important respects, Chalmers' accommodation claim fails.

A.

Chalmers cannot satisfy the second element of the prima facie test. She has forecast no evidence that she notified Tulon that her religious beliefs required her to send personal, disturbing letters to her co-workers. Therefore she did not allow the company any sort of opportunity to attempt reasonable accommodation of her beliefs.

As Chalmers recognizes, a prima facie case under the accommodation theory requires evidence that she informed her employer that her religious needs conflicted with an employment requirement and asked the employer to accommodate her religious needs. *See Redmond v. GAF Corp.*, 574 F.2d 897, 901 (7th Cir. 1978) (prima facie standard includes a "requirement that plaintiff inform his employer of both his religious needs and his need for an accommodation"); *Cary v. Carmichael*, 908 F. Supp. 1334, 1343-46 (E.D. Va. 1995). *Compare Ithaca*, 849 F.2d at 118 (if an employee requests to observe the Sabbath, the employer must attempt to accommodate) *with EEOC v. J.P. Stevens & Co.*, 740 F. Supp. 1135, 1137 (E.D. N.C. 1990) (employer may fire an employee who failed to provide advance notice of his religious beliefs regarding the Sabbath).

Chalmers concedes that she did not expressly notify Tulon that her religion required her to write letters like those at issue here to her co-workers, or request that Tulon accommodate her conduct. Nonetheless, for several reasons, she contends that such notice was unnecessary in this case.

Initially, Chalmers asserts that Tulon never explicitly informed her of a company policy against writing religious letters to fellow employees at their homes and so she had "no reason to request an accommodation." Reply Brief at 12. However, companies cannot be expected to notify employees explicitly of all types of conduct that might annoy co-workers, damage working relationships, and thereby provide grounds for discharge. As noted previously, Chalmers implicitly acknowledged in the letters themselves that they might distress her co-workers. Moreover, she conceded that, as a supervisor, she had a responsibility to "promote harmony in the workplace."

Although a rule justifying discharge of an employee because she has disturbed co-workers requires careful application in the religious discrimination context (many religious practices might be perceived as "disturbing" to others),

Chalmers, particularly as a supervisor, is expected to know that sending personal, distressing letters to coworkers' homes, criticizing them for assertedly ungodly, shameful conduct, would violate employment policy. Accordingly, the failure of the company to expressly forbid supervisors from disturbing other employees in this way, provides Chalmers with no basis for failing to notify Tulon that her religious beliefs required her to write such letters.

Alternatively, Chalmers contends that the notoriety of her religious beliefs within the company put it on notice of her need to send these letters. In her view, Chalmers satisfied the notice requirement because Tulon required "only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements." *Brown v. Polk County*, 61 F.3d 650, 654 (8th Cir. 1995) (*en banc*) (quoting *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993)).

Knowledge that an employee has strong religious beliefs does not place an employer on notice that she might engage in any religious activity, no matter how unusual. Chalmers concedes that she did not know of any other employee who had ever written distressing or judgmental letters to co-workers before, and that nothing her co-workers had said or done indicated that such letters were acceptable. Accordingly, any knowledge Tulon may have possessed regarding Chalmers' beliefs could not reasonably have put it on notice that she would write and send accusatory letters to co-workers' homes. *Cf. Brown*, 61 F.3d at 654 (holding that because the employee had engaged in similar religious conduct on prior occasions, employer had notice of the conflict).[3]

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[3] We emphasize that we do not hold, as the dissent suggests at 23-25, that an employer's knowledge of an employee's sincere religious beliefs can never not put an employer on notice of the possibility of some religious conduct by an employee at work, *e.g.* display of ashes on Ash

Chalmers also contends that the letters themselves provided notice that her religious beliefs compelled her to write them. But giving notice to co-workers at the same time as an employee violates employment requirements is insufficient to provide adequate notice to the employer and to shield the employee's conduct. *See Johnson v. Angelica Uniform Group, Inc.*, 762 F.2d 671 (8th Cir. 1985) (plaintiff failed to provide adequate notice to establish prima facie case where she left a note to her employer immediately before she went away for several days, informing the employer that she would need to exceed her allotted leave time for religious reasons).

In a similar vein, Chalmers appears to contend that because Tulon was necessarily aware of the religious nature of the letters after her co-workers received them and before her discharge, Tulon should have attempted to accommodate her by giving her a sanction less than a discharge, such as a warning. This raises a false issue. There is nothing in Title VII that requires employers to give lesser punishments to employees who claim, after they violate company rules (or at the same time), that their religion caused them to transgress the rules. *See Johnson*, 762 F.2d at 673 (employer need not establish that it attempted accommodation when plaintiff failed to provide adequate notice to the employer before violating employment rules, even though the employer knew of the religious motive for employee's violation prior to discharge).

Part of the reason for the advance notice requirement is to allow the company to avoid or limit any "injury" an employee's religious conduct may cause. Additionally, the refusal even to attempt to accommodate an employee's religious requests, prior to the employee's violation of employment rules and sanction, provides some indication, however slight,

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Wednesday or wearing a yarmulke, etc. We simply hold that in this case the knowledge that Tulon had of Chalmers' religious beliefs did not put it on notice that she would write, and send, personal, accusatory letters to co-workers at their homes.

of improper motive on the employer's part. The proper issue, therefore, is whether Chalmers made Tulon aware, prior to her letter writing, that her religious beliefs would cause her to send the letters. Since it is clear that she did not, her claims fail. *See J.P. Stevens*, 740 F. Supp. at 1137.

In sum, Chalmers has not pointed to any evidence that she gave Tulon — either directly or indirectly — advance notice of her need for accommodation. For this reason, Chalmers has failed to establish a prima facie case of discrimination under the religious accommodation theory.

B.

If we had concluded that Chalmers had established a prima facie case, Chalmers' religious accommodation claim would nonetheless fail. This is so because Chalmers' conduct is not the type that an employer can possibly accommodate, even with notice.

Chalmers concedes in the letters themselves that she knew the letters to her co-workers, accusing them of immoral conduct (in the letter to Combs, suggesting that Combs' immoral conduct caused her illness), might cause them distress. Even if Chalmers had notified Tulon expressly that her religious beliefs required her to write such letters, i.e. that she was "led by the Lord" to write them, J.A. 66, Tulon was without power under any circumstance to accommodate Chalmers' need.

Typically, religious accommodation suits involve religious conduct, such as observing the Sabbath, wearing religious garb, etc., that result in indirect and minimal burdens, if any, on other employees. *Cf. Wilson v. US West Communications*, 58 F.3d 1337, 1342 (8th Cir. 1995) (accommodation required when employee wore a religious button that bothered co-workers indirectly). An employer can often accommodate such needs without inconveniencing or unduly burdening other employees.

In a case like the one at hand, however, where an employee contends that she has a religious need to impose personally and directly on fellow employees, invading their privacy and criticizing their personal lives, the employer is placed between a rock and a hard place. If Tulon had the power to authorize Chalmers to write such letters, and if Tulon had granted Chalmers' request to write the letters, the company would subject itself to possible suits from Combs and LaMantia claiming that Chalmers' conduct violated *their* religious freedoms or constituted religious harassment. Chalmers' supervisory position at the Richmond office heightens the possibility that Tulon (through Chalmers) would appear to be imposing religious beliefs on employees. *Cf. Wilson*, 58 F.3d at 1342 ("Title VII does not require an employer to allow an employee to impose . . . religious views on others").

Thus, even if Chalmers had notified Tulon that her religion required her to send the letters at issue here to her coworkers, Tulon would have been unable to accommodate that conduct.

IV.

We do not in any way question the sincerity of Chalmers' religious beliefs or practices. However, it is undisputed that Chalmers failed to notify Tulon that her religious beliefs led her to send personal, disturbing letters to her fellow employees accusing them of immorality. It is also undisputed that the effect of a letter on one of the recipients, LaMantia's wife, whether intended or not, caused a co-worker, LaMantia, great stress and caused him to complain that he could no longer work with Chalmers. Finally, it is undisputed that another employee, Combs, told a company officer that Chalmers' letter upset her (although she later claimed that her working relationship with Chalmers was unaffected). Under these facts, Chalmers cannot establish a religious accommo-

dation claim. Accordingly, the district court's order granting summary judgment to Tulon is

AFFIRMED.

NIEMEYER, Circuit Judge, dissenting:

Charita Chalmers was a star employee of Tulon Company, and Tulon had rapidly promoted her to the top management position in its Richmond office. There is no suggestion in the record that she did not perform her job well, that she was ever disciplined before the incident in this case, or that Tulon's Richmond office did not function successfully. Nevertheless, Chalmers was fired without warning after she sent a proselytizing letter to her supervisor as a continuation of their earlier religious discussions. The letter, written because of Chalmers' unease with her supervisor's business practices, urged her supervisor "to get right with God" by repenting. While the letter stated that the supervisor was doing "some things" that were not pleasing to God, it made no specific accusations. Chalmers sent the letter to her supervisor's home, explaining, "I wrote this letter at home so if you have a problem with it you can't relate it to work." She also wrote that she expected no response and that any response should be made to God.

After Chalmers' supervisor made the request to his superior that Chalmers be fired, Tulon discovered that Chalmers had written a similar letter to a fellow employee. Accordingly, Tulon included the writing of both letters as its reason for terminating Chalmers. The letters violated no company policy, practice, or instruction, express or implied.

In affirming dismissal of Chalmers' religious discrimination claim on review of summary judgment, the majority has repeatedly and unfairly cast Chalmers' religious activity in the worst possible light, failing to take the facts in the light most favorable to her. This approach is not only unnecessarily hostile to Chalmers' religious practice, it violates our standard for reviewing summary judgments by taking facts in the

light most favorable to the non-moving party. *See, e.g., Evans v. Technologies Applications and Service Co.*, 80 F.3d 954, 958 (4th Cir. 1996) (requiring that facts be viewed in the light most favorable to non-moving party). Not only must we take facts in the light most favorable to the non-moving party, but we must also draw all legitimate inferences in the non-moving party's favor. *Evans*, 80 F.3d at 958. The majority opinion turns our standard of review on its head, indulging all of Tulon's characterizations of the facts, ignoring every inference in support of Chalmers, and finding that there is no factual support for Chalmers' claim.

For example, instead of treating the letter that Chalmers sent to her supervisor in a light most favorable to her, the majority accepts Tulon's characterizations and refers to the letter variously as disturbing, annoying, judgmental, accusatory, and critical. The majority also accepts the disputed claim that the letter disturbed Tulon's workplace and rejected Chalmers' claim that it was sent as sensitive, caring advice, making no accusations and demanding no response. And it is this single letter - the characterization and effect of which is so disputed - that indisputably led LaMantia to ask that Chalmers be fired.

Moreover, after taking the facts in a light hostile to Chalmers, the majority subjects those facts to a legal standard inconsistent with the language of Title VII. The majority imposes on Chalmers, as a condition to recovery, the requirement *not* imposed by statute to notify her employer in advance of her intent to send the letters in question and of their significance to her religion. Furthermore, it imposes on Chalmers the burden of proving that her religious practice could be accommodated by her employer, reversing the burden statutorily assigned to the employer that the practice could *not* reasonably be accommodated.

Because I would find that the facts taken in a light most favorable to Chalmers make out a *prima facie* case under Title VII for religious discrimination and that Tulon has not, as a

matter of law, demonstrated undue hardship in accommodating Chalmers' religion, I would remand this case for trial. Therefore, I dissent.

I

The record before the district court, taken in the light most favorable to Chalmers, demonstrates the following facts.

Chalmers has been a Baptist all her life, and in June 1984, she became an evangelical Christian, accepting Jesus Christ as her personal savior. Since then, she has tried to influence others to accept Jesus and partake of salvation. In accord with her belief that she should share the gospel, Chalmers openly speaks with others about religion and their spiritual health. She believes that she should look for opportunities to share the gospel with others, especially when others initiate religious conversations.

Chalmers began work for Tulon in October 1988 and, because of her superior job performance, was made supervisor in 1991. As supervisor, she was the only management-level employee in Tulon's Richmond plant. Chalmers reported to Richard LaMantia, who managed plants throughout the eastern United States and visited Richmond a few days each month.

LaMantia knew that Chalmers was a deeply religious woman and, prior to the incident giving rise to her termination, appeared to respect her for it. For instance, when in Chalmers' presence, LaMantia generally refrained from using profanity, whereas around others who did not care, "he would say whatever he wanted to say." Chalmers and LaMantia had many religious discussions, often initiated by LaMantia. LaMantia confided in Chalmers that three other persons had similarly urged him to accept Jesus Christ. Prior to the time that Chalmers was fired, Chalmers and LaMantia were having religious discussions approximately every three months.

LaMantia never discouraged these discussions, never expressed discomfort, and never indicated that it was improper for Chalmers to try to influence others in a religious way.[1]

In the course of their work together in Richmond, it became clear to Chalmers that LaMantia was misrepresenting to customers Tulon's ability to fulfill orders quickly. Chalmers said she was "led by the Lord" to write him because LaMantia's lying was "one of those things he needed to stop doing," "one of the things he needed to get right with God." Chalmers felt that she could write LaMantia about his lying because LaMantia believed in God and she and LaMantia had a personal relationship - Chalmers and LaMantia had shared religious experiences and LaMantia had taken Chalmers and her husband out to dinner. Chalmers did not, however, specifically refer to lying in her letter. Not wanting the letter to affect their relationship at work, Chalmers sent the letter to LaMantia's home and requested no response to it.[2]

When the letter arrived, LaMantia's estranged wife opened it and thought that the portion of the letter referring to "things in [LaMantia's] life that God was not pleased with" in fact referred to adultery. Mrs. LaMantia called Chalmers and asked her whether LaMantia was having an affair with an individual in the New Hampshire area where LaMantia supervised another facility. Mrs. LaMantia explained that she and LaMantia had separated three years earlier because of LaMantia's infidelity and that she now suspected it again. Chalmers told Mrs. LaMantia that she was unaware of any affair and that the letter was not referring to any adulterous

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[1] In the district court, counsel for Chalmers referred to an affidavit, or perhaps a portion of her deposition, where she also testified that LaMantia had "asked her on several occasions, When are you going to start a Bible study here." J.A. 120. That portion of her deposition, which even suggests LaMantia's encouragement, was not, however, formally attached to Chalmers response to Tulon s motion for summary judgment.

[2] The text of the letter is quoted in the majority opinion.

conduct. Chalmers stated she was sorry that the letter upset Mrs. LaMantia, assuring Mrs. LaMantia that she was referring only to LaMantia's business practices. Unconvinced of Chalmers' explanation, Mrs. LaMantia called her husband. Because of Mrs. LaMantia's misinterpretation of the letter and refusal to accept Chalmers' explanation, the LaMantias' relationship became further strained. When Chalmers heard that the letter had been misinterpreted and had upset the LaMantias, she called the LaMantias' home and, on reaching no one, left a message on the answering machine that she was sorry and did not mean to offend anyone.

Angered that Chalmers had sent the letter, LaMantia informed Tulon's vice president of administration, Craig Faber, that he could no longer work with Chalmers and requested that Chalmers be fired. LaMantia and Faber agreed that Faber should "handle the termination." Faber conducted a brief investigation without questioning Chalmers and then sent Chalmers a letter of termination.

While investigating the incident, Faber discovered that Chalmers had sent another religious letter to Tulon employee Brenda Combs. Combs had confided in Chalmers that she had been involved in an adulterous relationship and had recently given birth out of wedlock. Chalmers also knew that Combs had been away from work for months, attempting to recover from an illness that doctors had been unable to diagnose. In her letter to Combs, Chalmers tried to persuade Combs to repent of her sexual misconduct. She explained that when people sin, "[God] will allow things to happen to them or their family until they open their eyes and accept Him," and "God can put a sickness on you that no doctor could ever find out what it is." Chalmers added, though, "I'm not saying this is what happened to you."[3] While Combs was upset upon reading the letter, she explained in a statement that she did not find it offensive and, more importantly, that it did not affect

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[3] The text of the letter is quoted in the majority opinion.

her working relationship with Chalmers. Indeed. Combs never complained to anyone at Tulon, and she acknowledged to Tulon management that she received the letter only when Faber independently found out about it and contacted her. During the two-week period after the letters were sent and before Chalmers was fired, there was no adverse change in the Richmond workplace. The only disruption at Tulon's Richmond plant came when employees learned that Chalmers was being fired for sending the letters. "They couldn't believe it."

Even though Combs has stated that the letter to her "did not offend me nor did it damage our working relationship," Faber informed Chalmers that she was being fired because she had made "a serious error in judgment . . . in sending letters to Rich LaMantia and Brenda Combs." which "offended them . . . and damaged [their] work relationship." The parties agree that Tulon fired Chalmers because she wrote the letters, and all agree that the letters addressed religious concerns. Chalmers concluded at the time of her termination. "I was terminated because I had written two letters to Rich and Brenda regarding salvation and God." Similarly, in his May 6, 1994 affidavit, Faber acknowledged that the letters were "religious in nature." Indeed, the very language of the letters unquestionably support that conclusion.

Challenging her termination from employment, Chalmers filed suit under Title VII of the Civil Rights Act of 1964 for religious discrimination and failure to accommodate her religious practices. The district court entered summary judgment, concluding that Chalmers had not made out a *prima facie* case and that even if she had, Tulon had articulated a legitimate nondiscriminatory reason for her firing. Without articulating the reason, the court added,

> And the fact that Ms. Chalmers in her zealotry writes disruptive letters in effect accusing people of criminal activity and things of that nature has such an impact on other employees' ability to perform in the work place, that the company would have been

> derelict in its responsibility if it didn't try to get rid of her and have a less disruptive employee in the lineup.

The district court pointed to no facts in the record to support those conclusions.

From the district court's judgment, Chalmers appealed.

II

The provision of Title VII on which Chalmers bases her claim makes it unlawful for an employer "to discharge any individual . . . because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). "The term 'religion' includes all aspects of religious . . . practice . . . unless an *employer demonstrates* that he is unable to reasonably accommodate to an employee's . . . practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (emphasis added). The legal analysis for a claim under those provisions must therefore address two burdens: Chalmers' burden of showing that she was fired because of a religious practice and Tulon's burden of demonstrating that it could not accommodate the practice without undue hardship.

To satisfy her burden and establish a *prima facie* case of religious discrimination under Title VII, Chalmers must prove (1) that she engaged in a religious practice, (2) that the employer discharged her or took other adverse employment action against her, and (3) that the employer's action was motivated at least in part by her religious practice. In short, she must show she was discharged "because of" the religious practice.

Because Chalmers' conduct in sending proselytizing letters was unquestionably a religious practice and she was discharged, she has indisputably established the first two elements of her case. As for the third element, a factfinder could reasonably conclude that her discharge was motivated by the religious practice of sending proselytizing letters. Tulon advised Chalmers she was being terminated because she sent the

two letters, and indeed, the majority appropriately notes that "[t]he parties agree that Tulon fired Chalmers because she wrote the letters." Slip op. at 12. In providing evidence to establish these three statutorily required elements, Chalmers has made out a *prima facie* case of religious discrimination. Yet the majority would impose a significantly greater burden on Chalmers without explaining how its views are either required or warranted by the statute.

Relying on the Fifth Circuit's decision *in Turpen v. Missouri-Kansas-Texas RR Co.*, 736 F.2d 1022 (5th Cir. 1984), *aff'd on other grounds*, 479 U.S. 60 (1986), the majority concludes that Chalmers' claim was fatally flawed because she somehow failed to give Tulon notice of her religious beliefs. Obviously, if an employer is to be charged with discrimination against an employee "because of" the employee's religious beliefs or practice, the employer must be aware of the beliefs or practice and understand their religious nature. But the majority errs both legally and factually when it decides that Chalmers' claim must fail because she did not explicitly inform Tulon that she would write religious letters to coworkers.

A

It is legal error to construe Title VII to impose a burden on the employee of informing her employer in advance about each practice the employee will follow in furtherance of religious beliefs. It is undoubtedly true that an employer cannot be held liable for religious discrimination by, for example, assigning an employee to work on Sunday when the employer has no knowledge that work on Sunday violates the employee's religious beliefs. *See, e.g., EEOC v. Ithaca Indus., Inc.*, 849 F.2d 116 (4th Cir. 1988); *Redmond v. GAF Corp.*, 574 F.2d 897 (7th Cir. 1978). But that does not impose an additional religious disclosure burden on Title VII plaintiffs. Instead, it is merely a recognition that Title VII's "because of" requirement cannot be satisfied where the employer has no

knowledge that the conduct warranting discharge was religious in nature.

The majority has grafted a claim-defeating notice requirement onto the statutory requirements for establishing a *prima facie* case, concluding as a matter of law, "any knowledge Tulon may have possessed regarding Chalmers' beliefs could not reasonably have put it on notice that she would write and send accusatory letters to co-workers' homes." Slip op. at 14. This notice requirement would preclude liability for every adverse employment action taken because of a religious practice if the employer did not know *in advance* that the practice would take place, even though the employer recognized the practice as religious in nature. Under that rule an employer would automatically be exonerated from liability when, e.g., it fired an employee who arrived at work on Ash Wednesday with a cross of ashes marked on her forehead, because the employee violated a work rule against face paint. The irrationality of such a rule is readily apparent.

In *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995) (en banc), the Eighth Circuit appropriately avoided such an irrational rule. It noted, "Because the *first* reprimand related directly to religious activities by Mr. Brown, we agree with the district court that the defendants were well aware of the potential for conflict between their expectations and Mr. Brown's religious activities." *Id.* at 654 (emphasis added). The court concluded that the employer violated Title VII when it fired Brown (without attempting accommodation) based on the religious activities giving rise to the first reprimand. *See id* at 657. *Brown* thus stands for the precise proposition that the majority rejects: Religious conduct violating employment requirements may be sufficient to put an employer on notice of the need to accommodate the religious practice.

The wisdom of the Eighth Circuit's holding in *Brown* is demonstrable by understanding the irrational ramifications of the majority's ruling. The majority's rule would mean that *as*

a matter of law a Jew could not make out a *prima facie* case under Title VII if, on the first day of work, he was fired for wearing a yarmulke that, unknown to him, violated his company's dress code. Similarly, a Muslim would have no case for being fired the first time mandatory company meetings conflicted with his prayer schedule; a Jehovah's Witness would have none upon being fired for her disrespect in refusing to attend a company-wide celebration of the CEO's birthday; a Mormon would have none for being fired the first time he refused to work late on church-wide family nights. And, of course, as the majority concludes, an evangelical Baptist's case would fail as a matter of law if she is fired the first time she puts in writing the religious ideas that she has been permitted and encouraged to speak. This is not the law of Title VII. If the employer knows that conduct is religious when it makes the discharge decision "because of" that conduct, the *prima facie* elements of a religious discrimination claim have been satisfied.

B

Even assuming that the law requires Chalmers to inform Tulon about the practices she might take in furtherance of her beliefs, the majority impermissibly finds facts when it says "any knowledge Tulon may have possessed regarding Chalmers' beliefs *could not reasonably have put it on notice* that she would write and send accusatory letters to co-workers' homes." Slip op. at 14 (emphasis added). While one might be able to conclude that Tulon had no notice that the LaMantias would experience stress from Chalmers' letter - a fact irrelevant for assessing Chalmers' *prima facie* case - a fact-finder would certainly be entitled to view the record and conclude (1) that LaMantia was aware that Chalmers believed she should urge co-workers to accept Jesus Christ and (2) that the letters were a religious practice in furtherance of that belief. Indeed, when viewed in a light most favorable to Chalmers, Chalmers' assertions that she discussed religion repeatedly

with LaMantia, that LaMantia talked about his own religious encounters, that he showed Chalmers particular respect in the workplace, and that he never objected or took exception to any religious discussion with Chalmers could support the conclusion that he was encouraging her to continue her practices. The majority seems to conclude, however, that religious conversations are so dissimilar from written letters of identical content that a reasonable factfinder could never find sufficient employer notice of the employee's religious practices. But, if Tulon denies the sufficiency of notice based on LaMantia's experience with Chalmers, then the issue is in dispute and can only be resolved by factfinding.

III

Once a plaintiff establishes a *prima facie* case under Title VII, the burden shifts to the employer to demonstrate that it is "unable to reasonably accommodate to the . . . [religious] practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j); *Ithaca*, 849 F.2d at 118; *Redmond*, 574 F.2d at 901.

To meet its burden, Tulon must at a minimum demonstrate that Chalmers' practice was inconsistent with the needs of its workplace. Absent some inconsistency, Tulon cannot rely on the practice as a reason for discharging Chalmers. That is, if a religious practice is not in some way inconsistent with a company policy, custom, or requirement (whether explicit or not), permitting the practice cannot unduly burden the conduct of business. Yet Tulon has failed to demonstrate that the letters violated any company policy, custom, or requirement. Indeed, in briefing this case Tulon has pointedly conceded that it "had [no] policy prohibiting . . . the sending of letters (religious or not) to the homes of Tulon employees." Nor has it established beyond dispute that sending the letters in fact disrupted the workplace. Despite the statements of Combs and Chalmers that the workplace was not disrupted, the majority finds the opposite. To conclude, as the majority

has, that the employee disrupted the workplace requires several factual findings that are impermissible on review of a summary judgment.

Without Tulon even taking a position that it could not accommodate Chalmers' religious practice, the majority rules also that "Chalmers' conduct is not the type that an employer can possibly accommodate, even with notice." Slip op. at 15. Even if it were within the majority's province to make such a finding, it could not do so on the present record, drawing all legitimate inferences in favor of Chalmers. .

The majority assumes that Chalmers' "need" to write evangelical letters is absolute and that she would not stop writing them if asked to do so. This conclusion is drawn from the unsupported belief that Chalmers' "religious beliefs *required* her to send personal, disturbing letters to her coworkers," slip op. at 12 (emphasis added) and also at 13, or that they "compelled her to write them," slip op. at 14, and that "she has a religious *need* to impose personally and directly on fellow employees." Slip op. at 16 (emphasis added).[4] These conclusions, however, are not supported by the record. Chalmers stated that she was "*led* by the Lord" and "*inspired*" to write LaMantia. To conclude that these statements mean that she could not, consistent with her religious beliefs, accept requests to stop writing may not even be a legitimate inference, much less the only legitimate inference. Certainly, it requires factfinding, which we are not free to do.

The majority's holding that Chalmers' conduct was beyond accommodation is even more remarkable in light of the fact that the statute imposes the burden on the *employer* to

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[4] In applying Title VII, the majority also appears to distinguish religious *beliefs* from religious *practices*. *See e.g.*, slip op. at 9, 12, 13. Yet, Title VII prohibits discrimination based on an employee's *religion*, *see* 42 U.S.C. § 2000e-2(a)(1), defining religion explicitly to include "all aspects of religious . . . practice," *see* 42 U.S.C. § 2000e(j). Chalmers' letters are unquestionably an aspect of her religious practice, and they were recognized as such.

demonstrate that a religious practice *cannot* be accommodated without undue hardship. The parties have not even been given an opportunity to explore that issue at trial. By ruling that as a matter of law Chalmers' conduct was not susceptible to accommodation, the majority in effect shifts to Title VII plaintiffs the burden of refuting a defense that the defendant neither asserted nor demonstrated.

IV

Whatever we or the district court think about Chalmers' religious practices, it is not our place to preempt a trial of her claim by assuming that all factual disputes will be resolved against her. And we err legally by imposing a statutorily ungrounded prior notice requirement in circumstances where the employer fully appreciates the religious nature of a practice. Finally, we compound that error by shifting to the plaintiff a burden that the statute places on the defendant.

The judgment should be vacated and the case remanded for trial.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

C.A. No. 3:94CV868

Filed: July 26, 1995
Clerk, U.S. District Court
Richmond, VA

CHARITA D. CHALMERS,

Plaintiff,

v.

TULON COMPANY OF RICHMOND,

Defendant.

FINAL ORDER

This matter is before the Court on the Defendant's Motion for Summary Judgment. For reasons stated from the bench, the Defendant's motion is GRANTED ant the Plaintiff's case is DISMISSED with prejudice.

It is SO ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

Date: July 26, 1995

/s/ Richard L. Williams
Senior United States
District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

C.A. No. 3:94CV868

CHARITA D. CHALMERS,

Plaintiff,

v.

TULON COMPANY, TULON COMPANY OF RICHMOND,

Defendant.

MOTION FOR SUMMARY JUDGMENT

Before: Honorable Richard L. Williams, Judge

July 26, 1995
Richmond, Virginia

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LECLAIR, RYAN
By: DAVID E. NAGLE, ESQ.,
attorney, of counsel for the defendants

(The proceedings commenced at 10:08 a.m.)

THE CLERK: Civil action number 3:94CV868, *Charita D. Chalmers versus Tulon Company of Richmond.* John F. Pyle represents the plaintiff. David E. Nagle represents the defendant.

Are counsel ready to proceed?

MR. PYLE: We are.

MR. NAGLE: Yes, sir.

THE COURT: We're here on the defendants' motion for summary judgment.

Suppose you proceed, Mr. Nagle.

MR. NAGLE: Thank you, Your Honor. May it please the Court this is a civil action brought by Ms. Charita Chalmers against her former employer, the Tulon Company. She has asserted two claims: a Title 7 claim of religious discrimination and pendant state low claim of wrongful discharge.

As set forth in considerably more detail on citation and the discovery record so far, Tulon is a company which is based in California primarily engaged in the manufacture of drill bits used in the computer industry. It has facility in Richmond, Virginia, which it, during the relevant time period, has had from six to ten employees working in it. The eastern

regional sales manager of Tulon was a gentleman Richmond LaMantia who lived in Atlanta and had a responsibility for sales throughout the East Coast.

THE COURT: I'm familiar with all the background. She wrote these two letters. And tell me why you think that the action that was taken by the company doesn't qualify as religious discrimination.

MR. NAGLE: We would assure Your Honor that she fails to establish a prima facie case here. Looking at a Fourth Circuit standard set out in *Lawrence versus Marrs*, in order to establish a prima facie case, she would have to prove her performance was satisfactory and present direct or indirect evidence whose cumulative probative force supports a reasonable inference that the discharge was discriminatory.

THE COURT: Are you relying on *Lawrence v. Marrs?*

MR. NAGLE: Yes, sir. As to the first element, with respect to her ability to prove that her performance was satisfactory, we'll certainly assume arguendo that prior to her writing these letters that her performance was satisfactory, but that, in fact, was certainly unsatisfactory, so we would assert that she does not establish the first element there.

As to the second element, in order to --

THE COURT: She was sort of a self-styled in-house chaplain, wasn't she? She seemed to be monitoring what other employees were doing and made assumptions, like in the case of the young lady who had the child out of wedlock; that she committed adultery as opposed to just fornication. How did she have a pipeline into the bedroom of all these people knowing the intimate details of their relationships? Was she sort of a Mary Worth busybody-type person, or just what sort of an individual was she?

MR. NAGLE: First I would remind the court that this is a workshop which had a total of only six to ten employees during the relevant period, so I think it is possible to assume that a great deal of information was shared between the employees, and I believe that.

THE COURT: One of the targets lived in Atlanta. She must have had an intelligence system that did a lot of bedroom snooping down in that area.

MR. NAGLE: Mr. LaMantia was formally the supervisor of the Richmond office, but as set forth in both the Faber affidavit and Ms. Chalmers deposition, he was only in Richmond three to four days a month. So she did have contact with Mr. LaMantia. She was his direct subordinate in his absence which was the vast majority of days each month. She was the person in charge of the Richmond facility. She was titled a repoint supervisor, but since they had a crew of only half dozen repoint operators, she was the person in charge of the facility.

We would suggest, Your Honor, that she can't establish the prima facie case because she has certainly come forward with no direct evidence of discrimination. And as to indirect evidence, we would suggest that she has not presented anything which constitutes indirect evidence of discrimination. In her deposition and as set forth in motion for summary judgment, she admits unquestionably--

THE COURT: Assume that she can make out a prime facie case, what has she come forward with that rebuts your nondiscriminatory reason for terminating her?

MR. NAGLE: She has come forward with nothing, Your Honor. That moves to our second point. Assuming arguendo that prima facie under *McDonnell Douglas* we would have the decision to come forward and articulate a nondiscriminatory reason, we would submit her notice of termination given to her at the time of termination certainly does articulate

the legitimate nondiscriminatory reason that's confirmed by the affidavit of Mr. Faber.

Under *St. Mary's* as the court realized, the burden is then upon the plaintiff to come forward with evidence of pretext. She has failed to respond in any way, shape or form with any further evidence or affidavits. In fact, we would note that in her deposition as cited in our memorandum that supports summary judgment, she even acknowledged the possible impact of these, and we would say that would raise her obligation, her duty to come forward with some evidence of pretext.

Finally, due to the unusual state of religious discrimination cases, an employer can, under the *McDonnell Douglas* scheme can go beyond articulating a legitimate nondiscriminatory reason and show no reasonable accommodation available to cause undue hardship. If that is done, so ends the analysis, and we don't have to go into the step of pretext. And as an alternative to the argument, she has failed to come forward with evidence or pretext. We would raise this issue contrary to the assertion in her brief in opposition of summary judgment. Her conduct here was not as she characterized as exclusively religious as someone might characterize meditation or saying of a rosary that doesn't have any effect on any other workers. When conduct does impact the workplace and others who are in the workplace, this statute does recognize there are limits applicable, and that's where this reasonable accommodation limited by undue hardship applies.

THE COURT: For instance, if because of the intensity of her conviction each morning at 10:30 she closed her eyes, bowed her head and became nonfunctional for one minute because of her religious practices, and she did that at 3:30 in the afternoon and even included interactions of prayer for the well-being or everybody else that was employed, if you fired her for doing that, it would be religious discrimination, wouldn't it?

MR. NAGLE: In many cases it would, Your Honor. I would certainly acknowledge--

THE COURT: But if she isn't harassing anybody --

MR. NAGLE: The nature of that conduct is presumably not to disrupt others or have any impact. Now if she happened to be employed as an airline pilot and took that moment of meditation during a landing, I think the circumstances are different. That's why I think the statute does contemplate factual analysis. In almost every circumstance that would certainly be conduct which an employer would have a duty to reasonably accommodate.

We would suggest that in this case that the nature of her activity was not comparable to bowing her head and praying. The nature of it was specifically designed and intended to affect others in the workplace.

THE COURT: She was sort of a self-styled missionary, wasn't she?

MR. NAGLE: Certainly was, Your Honor.

THE COURT: To what extent do you have to accommodate people who want -- on a moonlighting basis want to wear the mantle of a missionary and upgrade the spiritual foundations of employees and that sort of thing? They are entitled not to be subjected to that sort of activity assuming that one other one was atheist, for instance.

MR. NAGLE: I would suggest that to the extent that she wishes to engage in some discussion of religious activity and that is discussion which is welcomed and participated in by others, then an employer would have some duty of reasonable accommodation. And while she stated in her deposition that she had never requested such accommodation, certainly the fact that she testified in her deposition that she had had such conversations with coworkers would suggest that the employer was not generally hostile to her religious

beliefs, but, in fact, did not have any objection to those kind of discussions. It was only when her conduct went beyond that to having a disruptive influence such as illustrated by the call from Mr. LaMantia to West Coast Management and the comment made by Ms. Combs and Faber regarding the letter. We think it's important to note that the plaintiff acknowledged in her deposition--

THE COURT: It might be helpful if you make a suggestion to Mr. LaMantia that he and his wife have an accommodation where they don't open each other's mail unless -- but open only their own. That might give him some relief from future problems.

MR. NAGLE: I'm not sure that this is the proper form for that suggestion to be raised. I think Mr. LaMantia has probably already made that and might not welcome it from me at this point. Mr. LaMantia is no longer employed by the company.

I do think it's important to note though as Ms. Chalmers acknowledged during her deposition, and I cited her testimony on Page 20 of my memorandum appearing at Page 85 in her deposition, that the most difficult part for her of being a supervisor was working with the employees trying to reconcile their different attitudes. She acknowledged that she had a duty to promote a good working relationship, promote harmony in the workplace, and we would suggest that that, In fact, goes right to the employer's argument here.

THE COURT: Are you claiming that her conduct was disruptive?

MR. NAGLE: Absolutely, sir. That it disrupted the workplace relationship.

THE COURT: I think I understand your position. Let me hear from Mr. Pyle.

MR. NAGLE: Would the court: like me to address wrongful discharge?

THE COURT: That's a pendant claim. You briefed that.

MR. NAGLE: Thank you very much.

MR. PYLE: Good morning, Your Honor. May it please the Court, Your Honor, I don't think the facts in this case are really in dispute. I think it's the characterization of the facts that is important. I think the defendant is trying to apply a neutral label like poor judgment to a conduct that is purely religious and trying to --

THE COURT: By what authority does your client get to be a self-styled and disrupt the orderly proceedings of her employer by writing letters such as she wrote?

MR. PYLE: Your Honor, in accordance with the deposition, the letters were in the context of ongoing verbal discussions about religion that had been going on.

THE COURT: It's an act of inner manning officiousness that she tries to dress up by claiming it flowed from her spiritual values. Now she can have whatever spiritual values that meets her fancy, but is she entitled to be an in-house missionary and disrupt other lives?

MR. PYLE: I think the disruption is a factual question that hasn't been reached.

THE COURT: But she's accusing these people of crimes. Now I don't know of any religion that encourages you to do that.

MR. PYLE: If you read the content of the letters themselves, the one to Mr. LaMantia did not raise any issues of adultery. That's something the defendant has inferred from that. And also the content of the letters was explicitly evangelical gospel; because you have problems in your life, you

need God. That was the basic substance of the letters, and they were in the context of ongoing dialogue. So certainly the plaintiff wasn't under any impression that these people were not receptive to these discussions. She only changed it from a verbal communication to a written communication, Your Honor, and I don't think the defendant has enunciated any reason why written is more disruptive than verbal, or why should she be on notice that that's not tolerated if the verbal was explicitly tolerated.

I think the plaintiff has direct evidence of discrimination and that's the termination letter. No employer that has reasonable corporate counsel is going to come out and say, We're firing you because of your religious convictions. They slap the label of poor judgment on her religious action and attempted to say that was now a nonreligious reason for getting rid of her. But the act that was the poor judgment was the communication of her religious beliefs in written form. So it's disingenuous, I think, to slap a label on there and thereby skirt Title 7.

If you parallel that to another religious discrimination case, for Sabbath day if you wanted to take the Sabbath day off, could the employer say, I'm not firing you because you want to take Sabbath day off but because you're showing poor judgment by not coming back to work on that Saturday or Sunday or asking for schedule change. If the plaintiff was wearing a religious garb or a symbol and the employer came along and said, I'm not firing you because you're wearing a religious symbol, I'm firing you because you're showing poor judgment by wearing something that's not in the uniform--

THE COURT: But what evidence do you have that the impact of these letters wasn't disruptive?

MR. PYLE: In the plaintiff's deposition it was clear that she works for two weeks beyond the alleged incidence of letter-writing; that there was no loss of production in

the facility: that no one called in sick; that the one alleged victim Brenda Combs was not impacted by the fact that she got this letter, and, in fact, in her deposition said Brenda Combs did not go to management. Management came to her after Mr. LaMantia complained. There is no --

THE COURT: Let me ask you about the impact that it had on Mr. LaMantia's life.

MR. PYLE: The only thing he enunciates, Your Honor, is that he could not longer trust the plaintiff's judgment.

THE COURT: Before you look at the stress that he was under at home, don't you think that an employee who is under ferocious stress at home isn't diminished in his capabilities of performing for his employer?

MR. PYLE: I don't know. I think that's a factual question whether it's reasonably impacted his job performance. But certainly the plaintiff was not responsible for that because she didn't allege an allegation of adultery in her letter. She merely, you know, talked about the gospel with him which was the context of their discussions for several years. And, in fact, in the affidavit of the plaintiff, she states that he asked her on several occasions, When are you going to start a Bible study here. So clearly she was on the perception he was open and receptive to religious communication, if not all or the bulk of her letter. I don't think any pressure he feels at home is the plaintiff's fault as much it is his wife's fault who mistrusted him and was going on to misread or read something into the letter.

I think we do have evidence of direct discrimination. I think that the only reason that they offer is that it's bad judgment, Your Honor, and I think that -- just from the point of view it allows the employer to slap a label on something and skirt the obligation of Title 7.

There are no legitimate nondiscriminatory reasons for firing her. She had a perfect work record. All of her performance evaluations according to her affidavit were excellent. She was advanced three times, went from making 4.50 an hour to $10 an hour. So clearly they were pleased with her performance. So there was only the two letters and letter of termination. And it was only the two letters whose content was purely religious and the motivation was religiously motivated that could have been the trigger for them to fire her. And then in that, Your Honor, they violated their own internal policies by not given her a verbal or written warning that this was inappropriate conduct or it was going to have an impact. And that I would suggest, Your Honor, is a reasonable accommodation that they invited the verbal by not saying anything to her for a period of years obviously because there were no complaints, and that an accommodation would have been to come to her and say, You shouldn't have done this in writing, but the verbal communication we're going to allow unless somebody says I don't want to hear from you any more. Clearly that didn't happen.

I'd also argue that they would have to justify a qualitative difference between verbal communication and written communication to justify any impact. Clearly the impact of values or discussions had no direct or derogatory impact on the workplace. And now it's only the written communication that they claim has an impact, and I think the defendant is going to have to factually determine or show why the verbal had no impact but the written did. And I don't think, Your Honor, that the defendant can show a substantial impact on the workplace, and I think that's a factual question for jury.

And on the state pendant claim, I would concede the Supreme Court of Virginia has ruled that one-year statute of limitation applies, and I think that does effectively foreclose--

THE COURT: You're dead in the water.

MR. PYLE: I think so.

THE COURT: Any rebuttal argument?

MR. NAGLE: Nothing further, but I'd be happy to --

THE COURT: The defendants' motion for summary judgment is granted and the case is dismissed with prejudice. And the grounds for the granting of the motion are that one, the plaintiff has not made out a prima facie case; and, two, even if she had, the defendant has articulated a legitimate nondiscriminatory reason for the firing, and it is -- under the circumstances it is not required to make any accommodations in these circumstances. And the fact that Ms. Chalmers in her zealotry writes disruptive letters in effect accusing people of criminal activity and things of that nature has such an impact on other employees' ability to perform in the workplace that the company would have been derelict in its responsibility if it didn't try to get rid of her and have a less disruptive employee in the line-up.

For that reason an order will be entered dismissing the case with prejudice, and counsel will receive a copy of it.

Recess court -- or adjourn court until tomorrow at 3 o'clock.

(The proceedings concluded at 10:28 a.m.)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2594

FILED: January 16, 1997
CA-94-868-R

CHARITA D. CHALMERS

Plaintiff - Appellant

v.

TULON COMPANY OF RICHMOND

Defendant - Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellant filed a petition for rehearing with suggestion for rehearing in banc.

Judge Niemeyer voted to grant panel rehearing. Judges Michael and Motz voted to deny.

A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Wilkins, Niemeyer and Williams voted to rehear the case in banc, and Chief Judge Wilkinson and Judges Russell, Widener, Hall, Murnaghan, Ervin, Hamilton, Luttig, Michael and Motz voted against rehearing in banc.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Motz for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK

42 U.S.C. § 2000e-2(a)(1)

§ 2000e-2. Unlawful Employment Practices

(a) Employer practices

It shall be unlawful employment practice for an employer---

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e(j)

§ 2000e. Definitions.

For the purposes of this subchapter--

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business.